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IN THE

Supreme Court of the United States

October Term 1960

No._____

M. MARSHALL LANDY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner prays that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit, entered on November 2, 1960.

OPINIONS BELOW

The opinion of the United States District Court, Southern District of Florida, has not been reported. The opinion of the Court of Appeals for the Fifth Circuit (App. 1) is reported at 283 F.2d 303 (CA 5, 1960).

JURISDICTION

This is a civil case. The judgment of the Court of Appeals was entered on November 2, 1960 (R 37)[1] and a Petition for Rehearing, timely filed, was denied without opinion on December 6, 1960 (R 41). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The district court dismissed the petitioner's original civil action to quash. The petitioner appealed to the Court of Appeals on the ground that, under the circumstances, mere compliance with the subpoenaes would violate the petitioner's privilege against self-incrimination. The Court of Appeals sustained partly upon the existence of a "required records" doctrine. The questions presented are, thus,

(a) Whether a taxpayer under criminal investigation may be compelled by administrative subpoena to furnish evidence against himself, which evidence may be furnished by the mere act of appearing and claiming privilege; and

(b) Whether (as stated by the Court of Appeals in its reason for decision) the so-called "required records" doctrine compels a taxpayer to produce his personal books and records.

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[1]The appeal in this case was, by order of the Court of Appeals dated August 22, 1960, ordered to be prosecuted on the original transcript without printing, in which form the record necessarily arrives in this Court. This order was not upon motion of the Petitioner, but was *sua sponte*.

STATUTES INVOLVED

U.S.C.A., CONSTITUTION

AMENDMENT V.

"No person shall * * * be compelled in any criminal case to be a witness against himself. * * * *"

Tit. 26 U.S.C.:

§ 7602. Examination of books and witnesses

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his

delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry. Aug. 16, 1954, 9:45 a.m., E.D.T., c 736, 68A Stat. 901."

STATEMENT OF THE CASE

The Petitioner is a taxpayer against whom criminal proceedings are being considered by agents of the Intelligence Division of the Internal Revenue Service. On May 2, 1960, petitioner was served with three certain administrative subpoenaes by an agent of the Intelligence Division (R 2(a), 2(b) and 2(c), Appendix 3, 4 and 5) These subpoenaes purported to describe petitioner as an officer of various corporations, and they required his personal attendance before such Special Agents to give testimony for use by them.

The petitioner filed his timely original application before the District Court, invoking the jurisdiction of the District Court pursuant to the provisions of 26 U.S.C. §1604 and 28 U.S.C. §1340, to quash the subpoenaes alleging that the agents of the Internal Revenue Service were attempting to prepare or allege criminal charges against the petitioner, and that enforcement of the subpoena would be a denial of petitioner's constitutional rights. (R 1-2)

The respondent filed a motion to dismiss the application (R 4) and in the same action, upon petition and affidavit, procured an Order to show Cause (R 15) which order directed the petitioner either to appear and testify or appear before the Court and show cause "why he should not be so directed to appear and testify." At the time and place specified in said Order, after Notice (R 14) the petitioner appeared before the United States District Court. At that time the District Court refused to take testimony, although requested to do so.

At this hearing, the respondent filed an amended petition for Order to show Cause (R 18) and the District Court entered its order granting the motion of the United States to dismiss petitioner's application and entered an order (R 16) which was understood by all parties as an order requiring the petitioner to appear and testify upon the pain of contempt.

The petitioner filed timely notice of appeal to the United States Court of Appeals for the Fifth Circuit. The District Court denied petitioner's motion for stay, but such motion was granted upon subsequent motions in the Court of Appeals (R 32). The cause was argued before the Court of Appeals, pursuant to special rulings requiring expedited handling (R 33).

On November 2, 1960, the Court of Appeals affirmed (App. p. 1, R 35), rejecting the petitioner's contentions that he might be compelled to incriminate himself merely by responding to the subpoena, and holding inferentially that the so-called "required records" doctrine was applicable to the books and records of a taxpayer.

REASONS FOR GRANTING THE WRIT

The petitioner respectfully submits that the case at presents a case of novel and first impression to this Court, and that the facts in the case at bar show the existence of a practice by government officials well calculated to circumvent and nullify the protections afforded by the Fifth Amendment.

1. *It May Reasonably Be Supposed that Mere Obedience to the Subpoenaes Will Deprive Petitioner Of His Constitutional Rights Against Self-Incrimination.*

While the subpoenaes in this cause purport to *describe* the petitioner as an officer of various foreign corporations, it has been alleged that these subpoenaes are directed in his individual capacity. Thus, paragraph 3 of the original application alleges:

> 3. That said subpoenaes are directed to the applicant individually, and do purport to require said individual to testify concerning matters affecting, or which might affect, his individual income tax liabilities.

Proceeding as it does in the form of a civil proceeding which was disposed of (partially) by the granting of a motion to dismiss (R 17) every material fact pleaded in the application should be taken as true. *Land v. Dollar*, 330 U.S. 731 (1947). Although the Court of Appeals dismissed this contention as a "general allegation", it is submitted that for the purposes of this proceeding, the respondent, through its authorized agents, has subpoenaed

petitioner to give testimony for use in a possible criminal proceeding against himself.

The petitioner is aware that the customary remedy of a witness who has been placed in such position by any department of the United States, by the subpoena of a grand jury, congressional committee, administrative agency or court is to appear in obedience to the subpoena, and, then and there, to assert the privilege against any questions which such witness correctly feels may tend to incriminate him; having care that he does not assert the privilege too soon and lay himself open for contempt, nor too late, and be held to have waived the privilege.

Petitioner contends this cause deserves review by this Court, however, because existing judicial precedent indicates that, in cases of suspected tax evasion at least, the orthodox procedure may be wholly inadequate to protect the Constitutional rights of a prospective criminal defendant who has been subpoenaed before the Internal Revenue Service. Thus, in the case of *Beard v. United States*, 222 F.2d 84 (CA 4, 1955), cert. den. 350 U.S. 846, the Court of Appeals for the Fourth Circuit upheld the tax-evasion conviction of a defendant where the trial court had instructed the jury that while the taxpayer had the right, under the Fifth Amendment, to refuse to surrender or allow inspection of his books and records, the jury could consider the refusal as a circumstance in determining the issues of guilt and wilfullness.[2] This instruction was found

[2]The exact instruction in the *Beard* case was: "In this connection, I instruct you that the taxpayer may exercise his constitutional right under the Fifth Amendment to the Constitution to refuse to surrender or allow inspection of his books and records by revenue agents on the ground that to do so might tend to incriminate him in the event of criminal prosecution; and such constitutional privilege against self-

not to be erroneous, as against a claim by the defendant that such an instruction violated defendant's rights under the Fifth Amendment.

While the Fourth Circuit seemed to reason its decision on the "required records" doctrine, *Shapiro v. United States*, 335 U.S. 1, (1943), such rationale seems to petitioner clearly untenable in view of the fact that the instruction complained of recognized a constitutional right *to refuse surrender* of the taxpayer's books and records.

The defendant in the *Beard* case filed a petition for certiorari with the Supreme Court, and the American Bar Association, through its Bill of Rights Committee filed a brief with the Supreme Court in support of the defendant's position, while many legal writers expressed shock.[7] The government's memorandum to its brief in opposition to certiorari stated that it would not oppose certiorari if the case really presented that issue, but contended that the taxpayer had not effectively claimed the privilege.[8] We submit, however, that the *Beard* case clearly stands for the proposition that the *mere claim* by the taxpayer of his privilege against self-incrimination during the investigative stages of a criminal tax case, furnishes evidence of his guilt upon which the court may properly instruct the jury. Nor does the *Beard* case stand alone. Other courts

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incrimination is not impaired by the rule that the court has just stated, that the taxpayer's failure to produce any books and records that he may have, at a reasonable time for inspection by revenue agents, is a circumstance which may be considered by you, the jury, in determining the issue of wilfully filing a false return, in criminal proceeding such as this." 222 F.2d 84 at 92-93.

[7] Avakin, *Rights and Remedies of Taxpayers Suspected of Fraud*, "Taxes — The Tax Magazine", December, 1955, Commerce Clearing House, Chicago, Illinois.

in other circuits have held similarly. *Myres v. United States*, 174 F.2d 329 (CA 8, 1949); *Smith v. United States*, 236 F.2d 260 (CA 8, 1956), cert. den. 77 S.Ct. 148.

Petitioner frankly does not know whether the proposition for which he feels the *Beard* case stands is the law of the United States, and, indeed, earnestly hopes that it is not. Such a possibility exists, however, while the decisions stand unchallenged in the law books, and if this proposition were indeed the law, a taxpayer who wished to claim his constitutional privilege against self-incrimination during the investigative stages of a criminal tax proceeding would be placed inextricably on the horns of a dilemna: If he answered the questions he would be giving factual information which might be used against him in a criminal proceeding, but if he claimed privilege against self-incrimination he would, by virtue of his own words in refusing, be furnishing the prosecuting authorities with evidence which might be used against him in a criminal proceeding.

In order validly to claim the privilege against self-incrimination, it has long been held that a witness need not demonstrate to a mathematical certainty that an answer to a question would incriminate him, but only that such a reasonable possibility exists. *Blau v. United States*, 340 U.S. 159 (1950). Petitioner submits that while the *Beard*, *Myres* and *Smith* cases stand as judicial precedent, and where this Court has not seen fit to disturb these holdings on petitions for certiorari, there exist reasonable grounds for belief that the propositions for which these cases stand is the law.

If this be so, there is an equally reasonable possibility

that if the petitioner is required to appear before the agents of the Internal Revenue Service, *either* his answer to the question *or* his words in claiming constitutional privilege may furnish evidence for use against him. It is submitted that this situation is clearly distinguishable from the traditional line of cases holding that a defendant may, consistent with the Fifth Amendment, be required to appear at a certain place, stand in a police line-up, don a jacket, etc., for the purposes of identification. Here, it may be the defendant's own words *in claiming privilege* which may furnish evidence for use against him.

2. *The Apparent Extension By the Court of Appeals of the "Required Records Doctrine" to Personal Papers and Records is a Startling Departure From Existing Precedent.*

The Court of Appeals rejected the above contention by the petitioner in the following language:

> "In our view *Beard v. United States*, stands for no such proposition. It is based rather on the doctrine announced in Shapiro v. United States, 335 U.S. 1, the 'required records' doctrine."

Initially the petitioner respectfully submits that the statement by the Court of Appeals is not borne out by the *Beard* case since, as above stated, the instruction in the *Beard* case recognized the existence of a constitutional right in the defendant to refuse surrender of his books and records, which concept is diametrically opposed to the holding in the *Shapiro* case. On the other hand, the Court of Appeals in this case appears to be (inferentially at least) extending the "required records" doctrine to hold

that the personal books and records of a taxpayer are not subject to the constitutional privilege against self-incrimination. If so, this would be a novel and shocking departure from eighty years of judicial precedent, which would call for immediate exercise of the supervisory powers of this Court.

Ever since the case of *Boyd v. United States*, 116 U.S. 616 (1886) it has been a settled proposition that a taxpayer doing business as an individual may refuse access to his own books and records on constitutional grounds, and this rule has been many times recognized both before and after the *Shapiro* case, e.g., *Hanson v. United States*, 186 F.2d 61 (CA 8, 1951) and *Blumberg v. United States*, 222 F.2d 496 (CA 5, 1955). The narrow area of holding encompassing the required records doctrine as enunciated in *Shapiro v. United States*, 335 U.S. 1, (1948) has never been extended to include the books and records of an individual taxpayer—even by the present position of the government—and, although the matter has not been squarely decided by this Court since the *Shapiro* case, legal writers have uniformly questioned whether the doctrine could ever be so far extended.[4]

The petitioner submits that if such an extension of the doctrine is to be made, that it is of overriding importance, requiring review by this Court.

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[4]Harry Graham Balter, The Journal of Taxation, Vol. 8, No. 3, March 1958, p. 131; Lipton, *Record Keeping and the Privilege Against Self-Incrimination*, N.Y.U. 14th Ann. Inst. on Fed. Taxation, p. 1331; Avakian, Taxes — The Tax Magazine, op. cit.

CONCLUSION

For the reasons above stated, it is respectfully submitted that this case presents important questions of constitutional law as applied to the administration of the revenue laws and that further review is warranted. The Petition for Certiorari should be granted.

Respectfully submitted,

ARTHUR B. CUNNINGHAM and
PHILIP T. WEINSTEIN
CUNNINGHAM & WEINSTEIN
Suite 812, Ainsley Building
Miami 32, Florida
Attorneys for Petitioner

By:_____

CERTIFICATE OF SERVICE

IT IS HEREBY Certified that four copies of the above and foregoing Petition for Writ of Certiorari have been served upon E. Coleman Madsen, United States Attorney, Federal Building, Miami 32, Florida, and that four additional copies have been deposited in the United States Mail, first class postage prepaid, to the Honorable Solicitor General of the United States, Washington 25, D. C., this 3rd day of February, 1961.

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18504

M. MARSHALL LANDY,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(November 2, 1960.)

Before RIVES, Chief Judge, and TUTTLE and WISDOM, Circuit Judges.

PER CURIAM: The judgment of the trial court requiring the appellant to respond to the administrative subpoena of the Internal Revenue Service is affirmed.

Appellant's motion to quash was based on the theory

that appellant's constitutional privilege against testifying against himself would be violated if he was required to respond to the subpoena. This, appellant contends, is to be deduced from the holding of the Court of Appeals for the Fourth Circuit in *Beard v. United States*, 4 Cir., 222 F. 2d 85, cert. den. 350 U.S. 846. Appellant contends that that case stands for the proposition that if a taxpayer, who is subsequently tried for criminal tax evasion, appears in response to a subpoena and then relies on the Fifth Amendment as a basis for refusing to answer specific questions, such use of the Fifth Amendment can be shown to the jury on the subsequent trial as an inference of guilt. In our view *Beard v. United States* stands for no such proposition. It is based rather on the doctrine announced in *Shapiro v. United States*, 335 U.S. 1, the "required records" doctrine.

We hold that the trial court correctly decided that it could not quash the subpoena on the general allegation that it was intended for purposes other than those for which it purported to issue and that it might result in questions which the subpoenaed witness could constitutionally refuse to answer. The privilege of the Fifth Amendment must be exercised in connection with precise questions and not as a general excuse for refusing to appear in response to subpoena. *Rogers v. United States*, 340 U.S. 367.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana

Dec. 19, 1960

FORM 2039 A
MAY 1955

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

SUMMONS

In the matter of the tax liability of

Isthmanian Aviation Corporation
c/o M. Marshall Landy, President
Miami International Airport
Miami, Florida

Internal Revenue District of Jacksonville, Florida

PERIOD(S)

1952 to 1958, inclusive

THE COMMISSIONER OF INTERNAL REVENUE

TO: M. Marshall Landy, President
Isthmanian Aviation Corporation

AT: Miami International Airport, Miami, Fla. and/or 10245 Collins Ave., Miami Beach, Fla.

GREETING:

You are hereby summoned and required to appear before [redacted] an officer of the Internal Revenue Service, to give testimony relating to the tax liability and/or the collection of the tax liability of the above named person for the period(s) designated [redacted]

Place and time for appearance: Room 317 Plaza Building, 245 S.E. 1st Street, Miami, Florida

At _____

_____ on the 13th day of May

1960, at 1:00 o'clock P. M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States Commissioner to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of Section 7602, Internal Revenue Code of 1954

this 2nd day of May, 1960

ATTESTED COPY

SIGNATURE Bernard L. McDonald

In the matter of the tax liability of

Isthmanian Aviation Corporation
c/o M. Marshall Landy, President
Miami International Airport
Miami, Florida

Internal Revenue District of Jacksonville, Florida

PERIOD(S)

1952 to 1958, inclusive

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TO: M. Marshall Landy, President
Isthmanian Aviation Corporation

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Issued under authority of Section 7602, Internal Revenue Code of 1954

this 2nd day of May 1960

ATTESTED COPY

SIGNATURE Bernard L. McDonald

TITLE Special Agent

29

FORM 2039 A
MAY 1955

U.S. TREASURY DEPARTMENT • INTERNAL REVENUE SERVICE

SUMMONS

In the matter of the tax liability of

Joy Aviation, S.A.
c/o M. Marshall Landy, President
Miami International Airport
Miami, Florida

Internal Revenue District of Jacksonville, Florida

PERIOD(S)
1952 to 1958, inclusive

THE COMMISSIONER OF INTERNAL REVENUE

TO: M. Marshall Landy, President
Joy Aviation, S.A.

AT: Miami International Airport, Miami, Fla. and/or 10245 Collins Ave., Miami Beach, Fla.

GREETING:

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this 2nd day of May, 1960

ATTESTED COPY

SIGNATURE: Bernard R. McDonald

In the matter of the tax liability of

Jay Aviation, S.A.
c/o N. Marshall Landy, President
Miami International Airport
Miami, Florida

Internal Revenue District of Jacksonville, Florida

PERIOD(S)

1952 to 1958, inclusive.

THE COMMISSIONER OF INTERNAL REVENUE

TO: N. Marshall Landy, President
Jay Aviation, S.A.

AT: Miami International Airport, Miami, Fla. and/or 10245 Collins Ave., Miami Beach, Fla.

GREETING:

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_____ on the 13th day of May

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Issued under authority of Section 7602, Internal Revenue Code of 1954

this 2nd day of May, 19 60

ATTESTED COPY

SIGNATURE: Bernard R. McDonald

TITLE: Special Agent

2B

FORM 2039 A
MAY 1955

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

SUMMONS

In the matter of the tax liability of

Pearl Island Corporation, a Panamanian corporation
c/o M. Marshall Landy, President
Miami International Airport
Miami, Florida

Internal Revenue District of Jacksonville, Florida

PERIOD(S) 1952 to 1958, inclusive

THE COMMISSIONER OF INTERNAL REVENUE

TO: M. Marshall Landy, President
Pearl Island Corporation, a Panamanian corporation

AT: Miami International Airport, Miami, Fla. and/or 10245 Collins Ave., Miami Beach, Fla.

GREETING:

You are hereby summoned and required to appear before [redacted] an officer of the Internal Revenue Service, to give testimony relating to the tax liability and/or the collection of the tax liability of the above-named person for the period(s) designated [redacted]

Place and time for appearance: Room 317 Plaza Building, 245 S.E. 1st Street, Miami, Florida

At _____

_____ on the 13th day of May

1960, at 1:00 o'clock P. M.

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Issued under authority of Section 7602, Internal Revenue Code of 1954

this 2nd day of May, 1960

ATTESTED COPY

SIGNATURE: Bernard R. McDonald

In the matter of the tax liability of

Pearl Island Corporation, a Panamanian corporation
c/o M. Marshall Landy, President
Miami International Airport
Miami, Florida

Internal Revenue District of: Jacksonville, Florida

PERIOD(S): 1952 to 1958, inclusive

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this 2nd day of May, 1960

ATTESTED COPY

SIGNATURE: Bernard R. McDonald

TITLE: Special Agent

1C